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No. 90-1629

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA,
Petitioner,

v.

NORDIC VILLAGE, INC., DAVID O. SIMON,
Trustee

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent's Brief In Opposition

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40p.

QUESTION PRESENTED

Whether a bankruptcy court can order an agency of the federal government to return to the Trustee property of the bankruptcy estate which was transferred post-petition and without authorization by the bankruptcy court or by any provision of the Bankruptcy Code.

PARTIES TO THE PROCEEDINGS

David O. Simon was the Trustee in Bankruptcy of the Debtor, Nordic Village, Inc., during the pendency of the Debtor's Chapter 11 proceeding. On October 29, 1987, the Bankruptcy Court converted Nordic Village, Inc's bankruptcy case from a proceeding under Chapter 11 of the Bankruptcy Code to a proceeding under Chapter 7 of the Bankruptcy Code. At that time, Richard A. Baumgart was appointed as Trustee to succeed David O. Simon.

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SUMMARY OF THE ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT §§549 AND 550 OF THE BANKRUPTCY CODE AUTHORIZE A BANKRUPTCY COURT TO ORDER THE UNITED STATES TO RETURN AN UNAUTHORIZED, POST-PETITION TRANSFER OF PROPERTY OF THE ESTATE TO THE TRUSTEE.

This Court in *United States v. Whiting Pools, Inc.*, 103 S. Ct. 2309 (1983) has previously determined that the Bankruptcy Code authorizes a bankruptcy court to subject the United States to a turnover order with respect to property of the estate seized prior to the commencement of the bankruptcy case. The analysis of the Bankruptcy Code adopted by this Court in *Whiting Pools* mandates the same result in this case involving an unauthorized post-petition transfer of property of the bankruptcy estate.

Congress has expressly provided that the bankruptcy court has exclusive jurisdiction over property of the estate. Section 726 of the Bankruptcy Code guarantees equality of distribution among creditors, a fundamental policy of bankruptcy law, and provides that distribution of property of the estate will be handled by the Bankruptcy Court. Section 549 furthers the fundamental policy of equality of distribution among creditors. Section 549(a) of the Bankruptcy Code authorizes a trustee in bankruptcy to avoid all post-petition transfers of property of the bankruptcy estate which are not authorized by the bankruptcy court or by provisions of the Bankruptcy Code. Section 550 of the Bankruptcy Code authorizes recovery of the avoided transfer. These provisions, read together, advance the policy of equality of distribution to creditors, by providing a mechanism whereby property of the bankruptcy estate wrongfully

transferred after the commencement of the case can be brought back into the bankruptcy estate.

Sections 549 and 550 of the Bankruptcy Code are applicable to all creditors. Section 550(a) authorizes recovery from an "entity." The Bankruptcy Code, in §101(14), expressly states that the term "entity" includes a governmental unit. These provisions indicate that the same result should obtain when the United States is the creditor.

II. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT §§550 AND 106 OF THE BANKRUPTCY CODE AUTHORIZE SUITS BY A TRUSTEE IN BANKRUPTCY TO RECOVER UNAUTHORIZED POST-PETITION TRANSFERS OF PROPERTY OF THE DEBTOR'S BANKRUPTCY ESTATE FROM THE UNITED STATES NOTWITHSTANDING ANY ASSERTION OF SOVEREIGN IMMUNITY BY THE UNITED STATES.

Section 106(c) is a straight-forward and specific waiver of sovereign immunity as relates to the federal government. Section 106(c) expressly provides that any provision of the Bankruptcy Code which contains "creditor," "entity," or "governmental unit" applies to the United States. The scope of this waiver of sovereign immunity can only be determined by reference to the Bankruptcy Code provisions containing these trigger words. Section 550 contains one of the trigger words and therefore is applicable to the United States. Further, §550(a) specifically grants the bankruptcy court the authority to order the recipient of an avoided transfer to pay the value of the property transferred to the Trustee. Therefore, §§550 and 106 authorize suits by a Trustee in bankruptcy to recover a transfer of the type involved

here, an unauthorized post-petition transfer of property of the bankruptcy estate, from the United States notwithstanding any assertion of sovereign immunity.

The legislative history of §106(c) and of the related provisions containing the trigger words provides further evidence of Congressional intent to waive the sovereign immunity of the United States to permit a Trustee in bankruptcy to avoid and recover transfers of property of the bankruptcy estate.

ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT §§549 AND 550 OF THE BANKRUPTCY CODE AUTHORIZE A BANKRUPTCY COURT TO ORDER THE UNITED STATES TO RETURN AN UNAUTHORIZED, POST-PETITION TRANSFER OF PROPERTY OF THE ESTATE TO THE TRUSTEE.

The case before this Court presents a narrow issue of law: whether a Bankruptcy Court can order an agency of the federal government to return to the trustee property of the bankruptcy estate which was transferred post-petition and without authorization by the Bankruptcy Court or by any provision of the Bankruptcy Code. More specifically, this case requires this Court to determine whether the Bankruptcy Court can, under §§549 and 550 of the Bankruptcy Code, compel the Internal Revenue Service, an agency of the United States, to return to the bankruptcy estate property of the bankruptcy estate which the Internal Revenue Service ("IRS") improperly received subsequent to the commencement of the bankruptcy case from a defalcating officer of the debtor in satisfaction of the officer's personal tax obligations.

The issue of whether the Bankruptcy Court has the power to order an agency of the United States to return property of the estate has been before this Court previously. In *United States v. Whiting Pools, Inc.*, 103 S. Ct. 2309 (1983), this Court held that §542(a) of the Bankruptcy Code authorized the Bankruptcy Court to subject the IRS to a turnover order with respect to property of the estate seized prior to the commencement of the bankruptcy case.

In *Whiting Pools*, the IRS, an agency of the United States, had seized, prior to the filing of the Debtor's petition for relief under Chapter 11 of the Bankruptcy Code, the Debtor's tangible personal property pursuant to a tax levy. Subsequent to the filing of the petition in bankruptcy, the Debtor, acting as Debtor in Possession pursuant to §§1107 and 1108 of the Bankruptcy Code, sought an order requiring the IRS to turn over the seized property to the bankruptcy estate pursuant to §542(a) of the Bankruptcy Code. *Whiting Pools*, 103 S. Ct. at 2311.[1]

Much of this Court's analysis in *Whiting Pools* indicates that it was troubled by the notion that the IRS, which had taken possession of property of the debtor prior to the commencement of the debtor's bankruptcy case pursuant to a valid tax levy, could be compelled to return the property as a consequence of the filing of the debtor's bankruptcy petition. Noting that the IRS had, by virtue of its tax lien, a secured interest in the debtor's property, the Court began its analysis by examining whether §542(a) of the Bankruptcy Code "generally"

[1]Pursuant to §1107(a) of the Bankruptcy Code the "debtor in possession shall have all of the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, . . . of a trustee serving in a case under this chapter." 11 U.S.C. §1107(a).

authorizes the turnover of a debtor's property seized by a secured creditor prior to the commencement of reorganization proceedings. *Whiting Pools*, 103 S. Ct. at 2312. Focusing on the broad range of property to be included in the estate, the Court stated that:

> §541(a) provides that the "estate is comprised of all the following property, wherever located: . . . all legal or equitable interests of the debtor in property as of the commencement of the case." . . . Most important, in the context of this case, §541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code. Several of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced. Section 542(a) is such a provision. It requires an entity (other than a custodian) holding any property of the debtor that the trustee can use under §363 to turn that property over to the trustee. . . .
>
> As does all bankruptcy law, §542(a) modifies the procedural rights available to creditors to protect and satisfy their liens. In effect, §542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of the reorganization proceedings. (Citations omitted).

Whiting Pools, 103 S. Ct. at 2313-14. This Court specifically noted that its analysis of §542(a) was consistent with other provisions of the Bankruptcy Code which address the scope of the estate: specifically, §544, giving the Trustee the right of a lien creditor; §545, granting the Trustee the power to avoid statutory liens; and §549, granting the Trustee the power to avoid certain post-

petition transactions. *Whiting Pools*, 103 S. Ct. at 2314-15, n. 15.

Having concluded that the reorganization estate includes property of the Debtor seized pre-petition, this Court then considered whether §542(a) authorized the Bankruptcy Court to subject the IRS, an agency of the federal government, to a turnover order with respect to the seized property. The Court's analysis was direct and to the point:

> We see no reason why a different result should obtain when the IRS is the creditor. The Service is bound by §542(a) to the same extent as any other secured creditor. The Bankruptcy Code expressly states that the term "entity" used in §542(a), includes a governmental unit. §101(14). . . . Nothing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector in the form of an exclusion from the estate of property seized to satisfy a tax lien.

103 S. Ct at 2315-16.

Application of this Court's analysis in *Whiting Pools* to this case is compelled by the fact that this dispute is over an unauthorized post-petition transfer of property of the estate. The operative facts and timing of a dispute may render it uniquely a bankruptcy case. *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1400 (2d Cir. 1990), vacated and remanded, 111 S. Ct. 425 (1990, reinstated 924 F.2d 36 (2d Cir. 1991), cert. denied, -- S. Ct. ---, 59 U.S.L.W. 3583 (1991). See also *In re Arnold Print Works, Inc.*, 815 F.2d 165 (1st Cir. 1987). Such claims, arising post-petition and involving property of the estate, are intrinsic to the administration of bankruptcy cases. *Ben Cooper*, 896 F.2d at 1399-1400.

In *Ben Cooper*, the Second Circuit considered the question of whether an adversary proceeding, which arose after the debtor filed its chapter 11 petition and which was founded on state contract law, was within the scope of the federal bankruptcy power. *Ben Cooper*, 896 F.2d at 1399. At issue was an adversary proceeding filed in the Bankruptcy Court by the Debtor seeking a declaration that the insurance policy procured post-petition should remain in effect, determining that the insurance company was liable for losses sustained by the Debtor in Possession in a fire at one of its manufacturing facilities, and for punitive damages. *Ben Cooper*, 896 F.2d at 1397.

Noting that the date of the filing of the petition for relief operates as a line of cleavage against which the property of the estate is determined and rights of others connected with the proceeding are adjusted, the Second Circuit asserted that "[l]ogically, a post-petition contract that has as its subject matter an estate asset must be analyzed differently than one arising pre-petition." *Ben Cooper*, 896 F.2d at 1399. The Second Circuit specifically determined that the manufacturing facility where the fire occurred was an asset of the estate, that the Debtor's reorganization plan promised adequate insurance for estate assets, that the insurance company was aware that it was dealing with a debtor in possession, and that the subject matter of the policy was an asset of the estate, and the Court of Appeals held that the Bankruptcy Court could properly exercise jurisdiction over the matter. *Ben Cooper*, 896 F.2d at 1399. It concluded that "It is more difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration." *Ben Cooper*, 896 F.2d at 1400.

Unlike the state law contract claim at issue in *Ben Cooper*, this case arises directly from substantive bank-

ruptcy law. Section 541(a)(1) provides that the commencement of a case creates a bankruptcy estate consisting of all the debtor's legal and equitable interests in property as of the commencement of the case. 11 U.S.C. §541(a)(1). Other subsections of §541(a) provide that property of the estate also includes proceeds, product, offspring, rents or profits of or from property of the estate, and any interest in property that the estate acquires after the commencement of the case. 11 U.S.C. §541(a)(6) and (a)(7).

This Court, in construing the direct predecessor of §541(a) has stated that:

> the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned as the time of the filing of the petition.

Goggin v. Division of Labor Law Enforcement, 336 U.S. 118, 125-26 (1949) (quoting *Everett v. Judson*, 228 U.S. 474, 479 (1913). The line drawn at the filing date also adjusts "the rights of others connected with the proceeding." KING, 4 COLLIER ON BANKRUPTCY ¶541.04, at 541-22 (15th Ed. 1989). Among other rights, their entitlement to property of the estate is determined by reference to that date.

As noted by this Court in *Whiting Pools*, Congress intended that a broad range of property be included in the bankruptcy estate. *Whiting Pools*, 103 S. Ct. at 2313. The scope of the estate can be measured by the various provisions enacted by Congress which bring property into the estate: §543, dealing with property in the hands of a custodian; §545, granting the Trustee the authority

to avoid statutory liens; §547, granting the Trustee authority to avoid preferential transfers; §548, granting the trustee authority to avoid fraudulent conveyances; and §549, granting the trustee the authority to avoid post-petition transfers. Only one provision was enacted, however, to deal with distribution of the collected estate assets. Congress specifically provided that distribution of property of the estate shall be governed by the provisions of §726 of the Bankruptcy Code. Section 726 guarantees equality of distribution of estate assets among creditors of the Debtor, thus advancing a central policy of the Bankruptcy Code. *Begier v. United States*, 110 S. Ct. 2258, 2262 (1990).

Section 549(a) of the Bankruptcy Code is a provision that furthers this fundamental policy of equality of distribution among creditors. Section 549(a) provides, in pertinent part, that:

> [T]he trustee may avoid a transfer of property of the estate -
>
> (1) made after the commencement of the case; and
>
> (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or
>
> (B) that is not authorized under this title or by the court.

11 U.S.C. §549. The language of §549 is precise and explicit. It grants a trustee in bankruptcy the authority to avoid *all* post-petition transfers of property of the estate that are either unauthorized by the Bankruptcy Court or by the Bankruptcy Code, including those that are authorized by §§303(f) or §542(c) of the Bank-

ruptcy Code.[2] Pursuant to §551 of the Bankruptcy Code, any transfer avoided under §549 is preserved for the benefit of the estate. 11 U.S.C. §551.

While §549 merely provides for a declaration that an unauthorized post-petition transfer of property of the estate may be avoided, §550 authorizes recovery of the avoided transfer. Section 550(a) of the Bankruptcy Code provides that:

> Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the Court so orders, the value of such property, from-
>
> (1) the initial transferee of such transfer or the entity for whose benefit the transfer was made; or
>
> (2) any immediate or mediate good faith transferee of such initial transferee.

11 U.S.C. §550(a).

[2]The trustee's avoiding powers under §549 are limited in three ways. Subsections (b) and (c) create two very narrow exceptions to the trustee's power of avoidance. First, §549(b) provides that transfers during the "involuntary gap" period between the filing of the petition and the order for relief in an involuntary case are not voidable to the extent that post-petition value is given. Section 549(c) provides that a trustee may not avoid transfers of realty to good faith purchasers for present fair equivalent value and without knowledge of the commencement of the case, if a copy or notice of the petition has not been filed in an appropriate recording office where the property is located. Section 549(d) contains a separate statute of limitations for the trustee's avoiding powers under §549. None of these limitations are applicable to this case. KING, 4 COLLIER ON BANKRUPTCY ¶549-02 (15th Ed. 1989).

In short, §549(a) and §550(a), read together, advance the policy of equality of distribution to creditors that lies at the heart of bankruptcy law by providing a mechanism whereby property of the estate wrongfully transferred after the commencement of the case can be brought back into the bankruptcy estate.

Congress has expressly provided that the district court in which a bankruptcy case is commenced has "*exclusive* jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. §1334(d). [Emphasis Added]. Section 726 guarantees that distribution of property of the estate will be handled by the Bankruptcy Court. Section 549, by its language, expressly provides that the Bankruptcy Court, having obtained jurisdiction over the property at the commencement of the case, retains jurisdiction over the property until it is distributed in accordance with the distributive provisions of the Bankruptcy Code. With very narrow exceptions, §549 authorizes the recovery of all post-petition transfers not authorized by the Bankruptcy Code or the Bankruptcy Court. An adversary proceeding to recover such an unauthorized post-petition transfer arises solely from substantive bankruptcy law and is, therefore, exclusively within the jurisdiction of the Bankruptcy Court.

This case involves an unauthorized post-petition transfer of property of the bankruptcy estate by an officer of the Debtor, then acting as Debtor in Possession pursuant to §§1107 and 1108 of the Bankruptcy Code, to an agency of the United States, the IRS, in payment of the personal tax obligation of the defalcating officer. There is neither a question, nor an issue, that the transfer to the United States sought to be avoided by the Trustee occurred post-petition and involved property of

the estate. Petitioner has never suggested, and the record is devoid of any indicia or suggestion, that the complained of post-petition transfer was authorized by the Bankruptcy Court or under any provision of the Bankruptcy Code.

In *Whiting Pools* this Court first concluded that the Bankruptcy Code generally authorizes the recovery of property of the estate seized prior to the commencement of the bankruptcy case. *Whiting Pools*, 103 S. Ct. at 2312-15. It then determined, by a simple and direct analysis, that the result was not different when the creditor was the United States. *Whiting Pools*, 103 S. Ct. at 2315-16. It is obvious from the foregoing that §549(a) generally authorizes the recovery of property of the estate transferred post-petition and without authorization by the Bankruptcy Court or the Bankruptcy Code. Section 550(a) authorizes recovery from an "entity." The Bankruptcy Code expressly states that the term "entity" includes a governmental unit. 11 U.S.C. §101(14). The conclusion is clear, as this Court held in *Whiting Pools*, that there is "no reason why a different result should obtain when the IRS is the creditor." *Whiting Pools*, 103 S. Ct. at 2315.

Petitioner alleges that there should be a different result when the United States is the creditor. The essence of Petitioner's argument is that the management of a debtor in possession should be allowed to steal money from the bankruptcy estate and transfer the money to the government in satisfaction of personal tax obligations, and that the Bankruptcy Court cannot look to the government as the beneficiary of the funds for recovery. Nothing in the Bankruptcy Code or in its legislative history indicates that Congress intended to except the United States from the ambit of §549. Indeed, as noted above, the express language of the Code mandates that the United States be treated like any other creditor. To hold otherwise would be in violation of those provisions that grant the Bankruptcy Court control over the cases that it administers and would frustrate a fundamental policy of bankruptcy law: equality of distribution to creditors. Consequently, the Sixth Circuit Court of Appeals correctly affirmed the decisions of the lower courts in this case.

II. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT §§550 AND 106 OF THE BANKRUPTCY CODE AUTHORIZE SUITS BY A TRUSTEE IN BANKRUPTCY TO RECOVER UNAUTHORIZED POST-PETITION TRANSFERS OF PROPERTY OF THE BANKRUPTCY ESTATE FROM THE UNITED STATES NOTWITHSTANDING ANY ASSERTION OF SOVEREIGN IMMUNITY BY THE UNITED STATES.

As seen above, the decision of the Sixth Circuit Court of Appeals can be affirmed under the reasoning that this Court adopted in *Whiting Pools*,without reference to the express waiver of sovereign immunity contained in the Bankruptcy Code, 11 U.S.C. §106. The Sixth Circuit, however, grounded its ruling in an interpretation of §106(c) of the Bankruptcy Code, holding that "[s]ection 106 is a straight-forward and specific waiver of sovereign immunity as it relates to *federal* governmental units." [Emphasis added]. (Petition, App., 6a). The Sixth Circuit specifically found that "Sections 550 and 106 authorize suits by the Trustee to recover a transfer of the type involved here from the IRS regardless of sovereign immunity", (Petition, App., 6a).

Petitioner now asks this Court to review the Sixth Circuit's holding in the present case to determine the

extent to which §106(c) waives the sovereign immunity of the Federal Government. Petitioner alleges consideration of this issue is necessary because of the existence of a conflict between the Sixth Circuit and the Eighth Circuit as to the scope of the waiver of federal sovereign immunity under §106(c), because the broad interpretation of §106(c) adopted by the Sixth Circuit exposes the United States to claims for monetary recovery under a wider variety of Bankruptcy Code provisions, and because it believes the Sixth's Circuit's interpretation of §106(c) is incorrect as a matter of law.

A. There Is No Real Conflict Between The Circuits As To Whether 106(c) Waives The Sovereign Immunity Of The United States To Actions To Recover Property Of The Estate.

Petitioner contends that the decision of the Sixth Circuit directly conflicts with the Eighth Circuit's decision in *SBA v. Rinehart*, 887 F2d 165 (1989), and with the interpretation of §106(c) adopted by a plurality of this Court in *Hoffman v. Connecticut Department of Income Maintenance*, 109 S. Ct. 2818 (1989). However, the conflict between the Circuits, which the petitioner alleges, is neither apparent nor real. *SBA v. Rinehart* is distinguishable on its facts from this case. Furthermore, the holding of the Eighth Circuit in *SBA v. Rinehart*, adopting without analysis or explication of a rationale the interpretation of §106(c) urged by the *Hoffman* plurality, is suspect.

In *SBA v. Rinehart*, the Eighth Circuit addressed the power of a Bankruptcy Court to award punitive damages against the Small Business Administration, an agency of the United States, for violation of the Bankruptcy Code's automatic stay provision, 11 U.S.C. §362(a). In the instant case, no punitive damages were assessed and no violations of the automatic stay alleged. Here, the

Trustee in Bankruptcy simply seeks to recover property which was undeniably property of the estate, transferred post-petition to the IRS without authorization by the Bankruptcy Court or under any provision of the Bankruptcy Code. No other Circuit Court has addressed the issue of whether a Trustee in Bankruptcy can recover an unauthorized, post-petition transfer of property of the estate from the United States or any of its agencies. Thus, as a factual matter, there can be no conflict between the Circuits on this issue.

Admittedly, the Eighth Circuit in *SBA v. Rinehart* concluded that the *Hoffman* analysis "is equally applicable to a waiver of sovereign immunity by the federal government." *SBA v. Rinehart*, 887 F.2d at 170. However, the Eighth Circuit's holding was merely conclusory. Without either explicating a rationale or undertaking an analysis, the Court of Appeals adopted a construction of §106(c) in which only four of nine justices concurred. "[W]hile other courts have found this rationale sufficient, see [*SBA v. Rinehart*], at 169-70, *we know that four is less than five.*" [Emphasis added]. *In re Pearson*, 917 F2d 1215, 1216 (9th Cir. 1990), petition for cert. pending., No. 90-1208.

What is absolutely clear is that the Eighth Circuit need not have reached the issue of the scope of the waiver of sovereign immunity under §106(c) of the Bankruptcy Code in *SBA v. Rinehart*. The award of punitive damages for violation of the automatic stay is authorized by §362(h) of the Bankruptcy Code. Section 362(h) provides that "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. §362(h). Section 106(c)(1), the express statutory waiver of sovereign

immunity contained in the Bankruptcy Code, provides that "a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units." 11 U.S.C. §106(c)(1). As is noted by the Ninth Circuit in *In re Pearson*, 917 F2d at 1216 and by the dissent in *Hoffman*, 109 S. Ct. at 2826 n.4 (Marshall, J., joined by Brennan, Blackmun, and Stevens, J.J. dissenting), §362(h) does not contain any of the trigger words found in §106(c)(1) and therefore does not apply to governmental units. It is obvious that the Eighth Circuit could have concluded that Congress did not waive sovereign immunity of the United States to punitive damages under §362(h) without considering the extent of the waiver of sovereign immunity contained in §106(c). Since the reasoning of the Eighth Circuit is suspect and constitutes mere dicta, there is no real conflict between the Circuits on the issue of federal sovereign immunity under §106(c).

B. Since Only A Handful Of The Provisions Made Applicable To The United States By Operation Of §106(c) Envision Monetary Recovery, The United States Does Not Confront Claims For Monetary Recovery Pursuant To A Wide Range Of Bankruptcy Code Provisions Under The Sixth Circuit's Interpretation Of The Statute.

Petitioner alleges that under the reading of §106(c) adopted by the Sixth Circuit Court of Appeals, the United States confronts claims for monetary recovery pursuant to a wide variety of Code provisions: "[T]he only limit is the number of provisions of the Bankruptcy Code containing one of the trigger words. With this 'limit,' §106(c) would apply in a scattershot fashion to over 100 Code provisions." (Petitioner's Brief - p.12 - 13) (Quoting *Hoffman*, 109 S. Ct. at 2822).

Petitioner's allegation does not stand up under scrutiny. First, most of the "over one hundred code provisions" containing the trigger words specified in §106(c)(1) do not provide for monetary recovery from the sovereign. *Hoffman*, 109 S. Ct. at 2826 (Marshall, J., joined by Brennan, Blackmun, and Stevens, J.J. dissenting). Many of these provisions grant rights to the sovereign and provide no remedies to the Debtor.[3] Others provide remedies to the Debtor, but by their express language provide only for declaratory or injunctive relief.[4]

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[3]See, e.g., §303(b)(1) (permitting three or more "entities" to file an involuntary case against the debtor); §303(c) (giving "creditors" who do not file an involuntary case the same rights as those who do); §303(j) (requiring notice to all "creditors" before a Court may dismiss an involuntary case); §341(a) (requiring a meeting of "creditors"); §343 (permitting "creditors" to examine the Debtor); §349(b)(3) (revesting property in an "entity" if the petition is dismissed); §361 (setting forth adequate protection for certain property interest of an "entity"); §363(c)(2)(A) (preventing use, lease, or sale of cash collateral assets absent consent of an interested "entity"); §§501 and 502 (regulating filing of proofs of claims by "creditors"); §506(a) (granting secure status to lien "creditors"); §553 (granting rights of setoff to certain "creditors"); §§702(a) and 705 (giving qualified "creditors" the right to vote for the Trustee and the Creditors' Committee); §§507 and 726 (setting forth priorities of distribution to "creditors"); §727(c) (giving a "creditor" the right to object to a discharge); §1102 (providing for Court appointed creditors' committee); §1109(b) (giving a "creditor" the right to be heard on any issue); §1121(c) (providing that a "creditor" may file a reorganization plan). *Hoffman*, 109 S. Ct. at 2826 n.2 (Marshall, J., joined by Brennan, Blackmun and Stevens, J.J. dissenting).

[4]See, e.g., §365 (permitting the Trustee to assume or reject his executory contracts and unexpired leases in certain circumstances); §505 (permitting the Bankruptcy Court to determine the Debtor's tax liability in certain circumstances); §525 (protecting the Debtor against government discrimination in licensing and employment); §1141 (binding "creditors" to the terms of a con-

Only a *handful* of the "over one hundred code provisions" containing the "trigger" words clearly contemplate money judgments against a "creditor," "entity," or "governmental unit." *Hoffman*, 109 S. Ct. at 2826 (Marshall J., joined by Brennan, Blackmun, and Stevens, J.J. dissenting). Indeed, Petitioner in its Brief only identified three provisions which under the Sixth Circuit's interpretation would authorize monetary awards against the Federal Government: section 549 involving post-petition transfers; §547 involving pre-petition preferential transfers;[5] and claims for the "turnover" of funds. (Petition, p. 13, n. 15).[6]

firmed reorganization plan and discharging all other claims); §1142 (permitting the Bankruptcy Court to require performance of any act necessary to carry out a confirmed reorganization plan); §1143 (preventing an "entity" that fails to perform a required act from participating in the distribution of estate assets). *Hoffman*, 109 S. Ct. at 2826 n.3 (Marshall, J., joined by Brennan, Blackmun and Stevens, J.J. dissenting).

[5]The exposure of the United States to adversary proceedings brought under §547 of the Bankruptcy Code was severely limited by this Court's ruling in *Begier v. Internal Revenue Service*, 110 S. Ct. 2258 (1990). In *Begier*, a unanimous Court held that pre-petition payments of trust fund taxes to the IRS could not be avoided as preferences as such payments did not constitute transfers of property of the estate but were, instead, transfers of property held in trust for the government. Obviously, under *Begier*, pre-petition payments of non-trust fund taxes may still be avoidable as preferential. In *Begier*, a matter affecting the federal fisc, this Court made an extensive analysis of the legislative history of §§541 and 547 of the Bankruptcy Code. The legislative history of §547 clearly reflects that Congress intended that the Bankruptcy Code authorize a Trustee to bring suit against the United States for both the avoidance and recovery of preferential tax payments. (See H.R. Rep. No. 95-595, at 373, U.S. Code Cong. ¶ Admin. News, 1978, p. 6329).

[6]As discussed above, this Court has previously dealt with the applicability of the Bankruptcy Code provision dealing with the turnover of property to the estate. §542 of the Bankruptcy Code, in *United States v. Whiting Pools, Inc.*, 103 S. Ct. 2309, 2315 (1983)

C. The Sixth Circuit's Conclusion That §§550 And 106 Of The Bankruptcy Code Authorize Suits By A Trustee In Bankruptcy To Recover Unauthorized Post-Petition Transfers Of Property Of The Estate From The Federal Government Is Fully Supported By The Language Of §106(c), The Language Of The Bankruptcy Code Provisions Containing The Trigger Words Specified In §106(c)(1), And The Legislative History.

Section 106 of the Bankruptcy Code is clearly designated a "Waiver of Sovereign Immunity". 11 U.S.C. §106. By its express language, §106(c) provides that:

> notwithstanding *any* assertion of sovereign immunity —
>
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units. [Emphasis added].

11 U.S.C. §106(c). The Sixth Circuit Court of Appeals found in this case that §106 was a straight-forward and specific waiver of sovereign immunity as it relates to federal governmental units and that nothing in the provision suggests that the waiver of sovereign immunity is limited to injunctive or declaratory relief. *In re Nordic Village*, (Petition, App., 6a-7a). Petitioner specif-

holding therein that the Internal Revenue Service, an agency of the Federal Government, is bound by §542(a) to the same extent as any other secured creditor. Section 542(a) expressly provides that for the turnover of property of the estate "...or the value of such property" and therefore clearly grants the Bankruptcy Court authority to enter an affirmative monetary judgment, reflecting the value of the property of the estate, against any creditor in possession of such property.

ically asks this court to examine the extent and meaning of this express statutory waiver of sovereign immunity as it relates to the United States.

This Court recently considered the language of §106(c) in *Hoffman v. Connecticut Department of Income Maintenance*, 109 S. Ct. 2818 (1989), a case involving the sovereign immunity of the States. In that case a plurality of a sharply divided Court concluded that the language of §106(c) did not abrogate the Eleventh Amendment immunity of the States to actions for monetary relief where the State did not waive sovereign immunity by filing a proof of claim. *Hoffman*, 109 S. Ct. at 2824. Petitioner posits that the analysis adopted by the plurality in *Hoffman*, and subsequently by the Eighth Circuit in *SBA v. Rinehart*, should apply in this case. (Petition - p. 11).

A simple examination of the opinions entered by this Court in *Hoffman* indicates that the case contained no controlling analysis of §106(c) of the Bankruptcy Code. Four Justices, in an opinion by Justice White, concluded that §106(c) did not abrogate the sovereign immunity of the States as Congressional intent to do so was not unmistakably clear in the language of the statute. *Hoffman*, 109 S. Ct. at 2823. Four Justices, in an opinion by Justice Marshall, held that Congress had clearly expressed its intent to abrogate the Eleventh Amendment immunity of the States and that §106(c) did authorize a bankruptcy court to issue a money judgment against a State that has not filed a proof of claim in a bankruptcy proceeding. *Hoffman*, 109 S. Ct. at 2824-25 (Marshall, J., joined by Brennan, Blackmun, & Stevens, J.J., dissenting). The deciding vote was delivered by Justice Scalia, who did not construe the statute, concluding instead that Congress did not have the power to abrogate the State's Eleventh Amendment

immunity and therefore Congressional intent to do so was irrelevant. *Hoffman*, 109 S. Ct. at 2824. The opinion of an equally divided court is entitled to no precedential value. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987); *TWA, Inc. v. Hardison*, 432 U.S. 63, 73 n.8 (1977); *Neil v. Biggers*, 409 U.S. 188, 192 (1972); see also, *In re Pearson*, 917 F.2d at 1216 ("While other courts have found this rationale sufficient, we know that four is less than five.").

An examination of the analysis adopted by the plurality in *Hoffman* clearly indicates that the case is to be narrowly construed. The issue presented was "whether §106(c) of the Bankruptcy Code, 11 U.S.C. §106(c), authorizes a bankruptcy court to issue a money judgment against a *State* that has not filed a proof of claim in the bankruptcy proceeding." [Emphasis added]. *Hoffman*, 109 S. Ct. at 2821. The standard applied by the plurality was whether Congress had made its intent to abrogate the *States'* Eleventh Amendment immunity "unmistakably clear in the language of the statute." *Hoffman*, 109 S. Ct. at 2822 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). The plurality held that "in enacting §106(c) Congress did not abrogate the Eleventh Amendment immunity of the *States*" further emphasizing the narrowness of the issue it was deciding. [Emphasis added]. *Hoffman*, 109 S. Ct. at 2824.

The present case deals with the sovereign immunity of the United States. The Eleventh Amendment does not apply to the United States. Congressional power to abrogate the States' Eleventh Amendment immunity is not at issue. Congressional power to waive the sovereign immunity of the United States is undisputed. Thus, the Sixth Circuit correctly concluded that *Hoffman*, was not

precedent in this case. *Nordic Village*, (Petition, App. 10a).[7]

It is true that under common law sovereign immunity the United States, like the States, has an interest in being free from suit. However there is a distinction between common law sovereign immunity and the constitutional protections of the Eleventh Amendment. Common law sovereign immunity protects the government from a suit brought by one of its own citizens. A waiver of common law sovereign immunity goes to "whether" or "when" the government may be sued. The Eleventh Amendment, on the other hand, is a specific Constitutional provision which prohibits suits against the States in federal court. *In re Lawson Burich Association: Inc.*, 59 B.R. 681, 687 n. 8 (Bankr. S.D. N.Y. 1986),

[7]Numerous other courts have also concluded that *Hoffman* is not applicable in a case involving the United States. In *In re Simmons*, 110 B.R. 72, 73 (Bankr. M.D. Fla. 1990) the bankruptcy court held that "The [Internal Revenue Service's] reliance upon *Hoffman* is inapposite. The holding in *Hoffman*, like the [Eleventh] [A]mendment, does not apply to the federal government. *Hoffman* simply holds that a state is immune from damage claims of the Trustee under the [Eleventh] [A]mendment." Similarly, in *In re Iverson*, 108 B.R. 272, 273 (Bankr. D. Or. 1989) the bankruptcy court concluded that "The government misreads *Hoffman*. The Court did not under any reasonable construction reduce jurisdiction in cases against the United States such as *United States v. Whiting Pools, Inc.*, . . . where there is clear Congressional consent to liability and a substantive waiver of sovereign immunity." In *In re Price*, 103 B.R. 989, 994 (Bankr. N.D. Ill. 1989) aff'd. *In re Price* -- B.R. --- (N.D. Ill. 1991) (No. 89 C 7852, 89 B 00796), the bankruptcy court, in a decision recently affirmed by the district court, held that "The IRS's reliance on *Hoffman* is inapposite. The holding in *Hoffman* does not apply to the federal government. . . . The Supreme Court, interpreting the section 106 waiver of sovereign immunity narrowly, held that §106(c) should not be read to abrogate the [Eleventh] [A]mendment immunity of the state where the state has not voluntarily consented to a waiver."

(citing *Pennhurst State School and Hospital v. Halderman*, 104 S. Ct. 900, (1984)); *In re 995 Fifth Ave. Associates, L.P.*, 116 B.R. 384, 390 n. 5 (Bankr. S.D.N.Y. 1990). The Eleventh Amendment thus speaks to the forum in which a State may be sued and this Court has required plaintiffs to meet a stringent standard in demonstrating Congressional intent to abrogate this Eleventh Amendment immunity so that a State may be sued in federal court. (See *Atascadero*, 105 S. Ct. at 3148; *Pennhurst State School*, 104 S. Ct at 907). There is no analogous choice of forum problem where the United States or its agencies are sued in federal court. Therefore, Petitioner's assertion that the Sixth Circuit should have determined whether an intent to waive federal sovereign immunity from monetary recovery was unmistakably clear in the language of the statute, is incorrect as a matter of law. (Petition, p.15).

Protestations of the Petitioner to the contrary, this case involves a simple matter of statutory interpretation, involving a Congressional waiver of the sovereign immunity of the United States. It is well settled that the starting point for interpreting a statute is the language of the statute itself. *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). However, as was recently noted by this Court, "the text is only the starting point. . . . 'in expounding a statute, we must not be guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, 107 S. Ct. 353, 358 (1986) (citations omitted).

Section 106 of the Bankruptcy Code provides:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same

transaction or occurrence out of which such governmental unit's arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsection (a) and (b) of this section and notwithstanding any assertion of sovereign immunity —

(1) A provision of this title that contains "creditor", "entity", or "governmental unit", applies to governmental units; and

(2) A determination by the Court of an issue arising under such a provision binds governmental units.

11 U.S.C. §106. It is clear on the face of §106(c), by the use of the language "notwithstanding any assertion of sovereign immunity" that Congress intended to waive any claim of sovereign immunity for the United States under any section of the code containing one of the trigger words.[5]

The scope of the waiver of sovereign immunity found in §106(c) of the Bankruptcy Code can only be determined by reference to the Code provisions con-

[5]Besides the Sixth Circuit in this case, numerous Courts have concluded that Congress intended to waive any assertion of sovereign immunity by the Federal Government under any section containing the trigger words listed in §106(c)(1). See, *Neuweiler v. Schweiker*, 674 F2d 1201, 1202-1204 (7th Cir. 1982); *Gingold v. United States*, 80 B.R. 555, 561 (Bankr. N.D. Ga. 1987); *R & L. Refunds v. United States*, 45 B.R. 733, 735 (Bankr. W.D. Ky. 1985); *Gower v. Farmers Home Administration*, 20 B.R. 519, 521-522 (Bankr. N.D. Ga. 1982); *Remke, Inc. v. United States*, 5 B.R. 299, 300-302 (Bankr. E.D. Mich. 1980).

taining the trigger words "creditor," "entity," and "governmental unit." *Hoffman*, 109 S. Ct. at 2826 (Marshall J., joined by Brennan, Blackmun and Stevens, J.J. dissenting). Section 550 of the Bankruptcy Code is a provision containing one of the trigger words. Section 550 provides, in part:

(a) Except as otherwise provided, in this section, to the extent that a transfer is avoided under §§544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the Trustee may recover, for the benefit of the estate, the property transferred, or, if the Court so orders, the value of such property, from —

(1) The initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) Any immediate or mediate transferee of such initial transferee.

11 U.S.C. §550(a). Since §550(a) contains one of the trigger words it is applicable to the United States.

Furthermore, the express language of §550(a) provides that "the Trustee may recover, for the benefit of the estate, the property transferred, *or, if the Court so orders, the value of such property*, . . ". [Emphasis added]. 11 U.S.C. §550(a). Similarly, §542(a) provides, in pertinent part, "that an "entity"... shall deliver to the Trustee, . . such property or *the value of such property*. . ." 11 U.S.C. §542(a). By authorizing the "recovery" of the "value" of the property transferred, the statute clearly indicates Congressional intent to waive the sovereign immunity of the United States to actions in Bankruptcy Court seeking monetary recovery.

Congressional intent to waive sovereign immunity and the scope of such a waiver can only be ascertained

by reference to the underlying Congressional policy. *Keifer and Keifer v. Reconstruction Finance Corp.*, 59 S. Ct. 516, 517 (1939). Legislative history should also be thoroughly considered in any inquiry to determine Congressional intent. *Flora v. United States*, 357 U.S. 63, 65 (1958), aff'd after reh'g, 362 U.S. 145, reh'g denied, 362 U.S. 972 (1960); *Blum v. Stenson*, 465 U.S. 886, 896 (1984). Legislative history is relevant to a determination of the scope of a Congressional waiver of federal sovereign immunity. *Franchise Tax Board of California v. United States Postal Service*, 104 S. Ct. 2549, 2554 (1984).

The legislative history of §106(c) further supports the interpretation of that provision adopted by the Sixth Circuit in this case. The statement on §106(c) provided as follows:

> Section 106(c) relating to sovereign immunity is new. The provision indicates that the use of the term "creditor," "entity," or "governmental unit" in Title 11 applied to governmental units notwithstanding any assertion of sovereign immunity in that an order of the court binds governmental units. *The provision is included to comply with the requirements in case law that an express waiver of sovereign immunity is required in order to be effective.* Section 106(c) codifies *In re Gwilliam*, 519 F.2d 407 (9th Cir. 1975) and *In re Dolard*, 519 F.2d 282 (9th Cir. 1975), permitting the bankruptcy court to determine the amount and the dischargeability of tax liabilities owing by the debtor or the estate prior to or during the bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim. Except as provided in §§106(a) and 106(b), *subsection (c) is not limited to these issues, but permits a bankruptcy court to bind governmental units on other matters as well. For*

> *example, §106(c) permits a trustee or a debtor-in-possession to assert avoiding powers under Title 11 against a governmental unit; contrary language in the house report to H.R. 8200 is thereby overruled.* [Emphasis added].

124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 33993 (1978) (statement of Sen. DeConcini). Subsequent statements by the floor managers added:

> Section 547(b)(2) of the House amendment adopts a provision contained in the House bill and rejects an alternative contained in the Senate amendment relating to the avoidance of a preferential transfer that is payment of a tax claim owing to a governmental unit. As provided, section 106(c) of the House amendment overrules contrary language in the House report with the result that the Government is subject to avoidance of preferential transfers.

124 Cong. Rec. 32400 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 34000 (1978) (statement of Sen. DeConcini).

As is noted by Justice Stevens in his analysis of the legislative history of §106(c):

> Although the primary object of §106(c) was to provide the bankruptcy court with authority to determine the amount and dischargeability of tax liabilities even if a claim has not been filed, the legislative history thus indicates that the provision was also intended to cover "other matters as well" including specifically the avoidance of preferential transfers. *There was no suggestion that this authority did not include the power to order the return of real property and the payment of money damages or that*

> *the issues that the bankruptcy court could determine under §106(c) were limited to whether prospective or declaratory relief was appropriate.* [Emphasis added].

Hoffman, 109 S. Ct. at 2828 (Stevens, J., joined by Blackmun, J., dissenting).

Both the language of the statute and the legislative history indicated that Congress intended §106(c) to be a straight-forward and specific waiver of sovereign immunity as it relates to the United States. Petitioner's reliance on a crabbed construction of §106(c) overlooks this Court's admonition that a waiver of sovereign immunity is accomplished not by a ritualistic formula but by reference to underlying Congressional policy. *Keifer and Keifer*, 59 S. Ct. at 517. Where, as here, the federal government waives sovereign immunity, the scope of that waiver is to be construed liberally to effect its remedial purposes. *Hoffman*, 109 S. Ct. at 2829 (Stevens, J., joined by Blackmun, J. dissenting). As stated by this Court in *Block v. Neal*, 103 S. Ct. 1089, 1094 (1983) "The exemption of the sovereign from a suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." Thus, since the Sixth Circuit's analysis of §106(c) is supported by the statute and the legislative history, the decision below was correct and the petition for a writ of certiorari filed by the United States should be denied.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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